

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-12116-RWZ

JOHN OGBODO EZE

v.

ALBERTO GONZALES, et al.

MEMORANDUM OF DECISION

May 11, 2007

ZOBEL, D.J.

**I. Background**

Plaintiff John Ogbodo Eze (“Eze”), a native and citizen of Nigeria, has filed an action for declaratory judgment and writ of mandamus<sup>1</sup> to compel, inter alia, defendants Alberto Gonzales, Attorney General; Eduardo Aguirre, Director, U.S. Citizenship & Immigration Services (“USCIS”); and Michael Chertoff, Secretary of the Department of Homeland Security (“DHS”), to grant him temporary resident status under the Immigration and Naturalization Act (“INA”) Section 245A, 8 U.S.C. § 1160(a)(1), and to allow adjustment to permanent resident status under Section 1160(a)(2). (Docket # 1.) In addition, plaintiff has filed a separate civil rights action against, inter alia, the United States, DHS, the Suffolk County Jail, and police Captain Scududo of the Suffolk County House of Correction as a result of an alleged jailhouse assault and interference with

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<sup>1</sup> Specifically, plaintiff seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act, 5 U.S.C. § 702, Writ of Mandamus, 28 U.S.C. § 1361, and the INA, 8 U.S.C. § 1329.

plaintiff's deportation proceedings. (Docket # 2.)

The federal defendants now move to dismiss both causes of action. (Docket # 4). For the reasons noted below, I allow the motion to dismiss.

## **II. Discussion**

Eze entered the United States on December 30, 1977, to attend Marshall University in Huntington, West Virginia, as a non-immigrant student under Section 101(a)(15) of the INA, 8 U.S.C. § 1101(a)(15). On May 27, 1988, Eze was granted temporary resident status under Section 245A of the INA, 8 U.S.C. § 1160(a).

In 1990, the Immigration and Naturalization Service ("INS")<sup>2</sup> sought to terminate plaintiff's temporary residency status because he failed to disclose accurately his criminal history on his application in violation of Section 212 (a)(19) of the INA, in addition to being arrested several times after filing his application. Thereafter, the INS sought to remove Eze, however, the Immigration Judge ("IJ") dismissed the removal action because of the existence of a pending appeal from the termination of his status as a temporary resident.

On January 27, 2003, the INS issued an additional Notice to Appear in removal proceedings under Section 240 of the INA. (Docket # 1-2 at 19-21.) The Notice to Appear relied upon a January 10, 1991, Notice of Intent to Terminate status as a temporary resident. (Docket # 1-2 at 1.) In addition, the INS argued that removal was proper because Eze's status as a temporary resident had been terminated based on a

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<sup>2</sup> In 2004, USCIS, a bureau of the DHS, assumed the INS's immigration service functions. See Pub.L. No. 107-296, § 451, 116 Stat. 2135, 2195-97 (codified at 6 U.S.C. § 271 (West Supp. 2004)).

May 20, 1991, termination letter. After a February 2003 hearing, the IJ ordered plaintiff removed on November 13, 2003. On July 20, 2004, the Board of Immigration Appeals (“BIA”) affirmed the IJ’s removal order. (Docket # 5-2.)

Eze appealed the BIA’s decision to the Court of Appeals for the First Circuit on the ground that his status as a temporary resident was never properly terminated by the INS because the January 10, 1990, Notice of Intent to terminate status as a temporary resident was personally served on him in violation of the regulation governing termination of temporary status, 8 C.F.R. 245a.2(u)(2)(i), which requires such service by certified mail.<sup>3</sup>

On February 23, 2007, the First Circuit affirmed the BIA’s decision on the ground that “there is no evidence on record that Eze was prejudiced by personal delivery of the notice of termination of his temporary status.” See Eze v. Gonzales, 478 F. 3d 46, 47 (1st Cir. 2007).

#### **A. Termination of Temporary Resident Status**

The gravamen of plaintiff’s argument in the instant case is that his status as a

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<sup>3</sup> That statute provides, in pertinent part:

termination of an alien’s temporary resident status under paragraph (u)(1) of this section will be made before instituting deportation proceedings against a temporary resident alien and only on notice sent to the alien by certified mail directed to his or her last known address, and to his or her representative, if any. The alien must be given an opportunity to offer evidence in opposition to the grounds alleged for termination of his or her status. Evidence in opposition must be submitted within thirty (30) days after the service of the Notice of Intent to Terminate.

8 C.F.R. 245a.2(u)(2)(i) (emphasis added).

temporary resident was never properly terminated by the INS in violation of 8 C.F.R. 245a.2(u)(2)(i) as well as his Fifth Amendment right to due process. Plaintiff's argument is without merit. The issue plaintiff seeks to have this court decide – whether the government's failure to serve him by certified mail of notice of intent to terminate his status as a temporary resident complied with 8 C.F.R. 245a.2(u)(2)(i) – has already been decided by the First Circuit.

## **B. Civil Action**

In addition to his petition for declaratory and mandamus relief, Eze has filed a pro se civil complaint against, inter alia, the United States, DHS, the Suffolk County Jail, and Police Captain Scududo of the Suffolk County House of Correction and several unnamed corrections officers as a result of the actions of Captain Scududo. (Docket # 2.) In his complaint, Eze alleges: (1) that he was assaulted by another inmate while incarcerated at the Suffolk County House of Correction; and (2) that Captain Scududo “engaged in various acts or omission(s) calculated to prevent the plaintiff from diligently and effectively defending his deportation proceedings,” including, by “maliciously handcuff[ing] Mr. Eze’s hands behind his back while plaintiff was transported in a truck to Dedham [D]istrict Court.” (Docket # 2, Complaint at 5, 6.) Plaintiff alleges that such actions violated both the Federal Tort Claims Act, 28 U.S.C. § 2675, and the federal civil rights statute, 42 U.S.C. §§ 1983 et seq.

The Federal Tort Claims Act requires exhaustion of administrative remedies prior to the initiation of a civil action. See 28 U.S.C. § 2675(a). Failure to comply with this requirement results in the district court being deprived of subject matter jurisdiction.

See Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003). Accordingly, plaintiff's Federal Tort Claims Act claim is dismissed for failure to exhaust administrative remedies.

Next, plaintiff's Section 1983 claim against federal government actors must be dismissed, as Section 1983 pertains solely to state actors.<sup>4</sup> The only claims remaining, then, are the Section 1983 claims against state actors. However, because the state actors have not been properly served and the complaint was filed in November 2006, the court now directs plaintiff to file a brief showing cause within thirty (30) days why his action against the state actors should not also be dismissed for failure to effect proper service.<sup>5</sup> See Fed. R. Civ. P. 4(m). Failure to do so will result in sua sponte dismissal of the action.

### **III. Conclusion**

Defendants' motion to dismiss (Docket # 4) both the mandamus and declaratory judgment action (Docket # 1) and the civil rights action (Docket # 2) is ALLOWED.

Defendants shall show cause why the action against the state actors should not also be dismissed within thirty (30) days.

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<sup>4</sup> While not alleged here, a Bivens action might lie against the federal actors in their individual capacities. See, e.g., McCloskey v. Mueller, 446 F.3d 262, 271 (1st Cir. 2006) (citing Bivens v. Six Unknown Named Agents of FBN, 403 U.S. 388 (1971)). However, no such action lies against the United States, its agencies, or federal officers sued in their official capacities. See, e.g., Ruiz-Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000) ("It is well settled that a Bivens action will not lie against an agency of the federal government.").

<sup>5</sup> Mr. Eze's remaining bases for jurisdiction, namely, 28 U.S.C. § 1349 (governing jurisdiction by or against corporations), 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (the Administrative Procedure Act) are unavailing.

May 11, 2007

DATE

/s/Rya W. Zobel

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE